preempt local regulation of mobilehome park rents.[9] Accordingly, in 1998 Cotati enacted the Mobile Home Park Rent Stabilization Program, City of Cotati, Cal., Mun. Code, Ordinance No. 680, ch. 19.14, limiting the amount park owners can increase rents and providing for administrative review of the park owner/tenant relationship.[10]

Amicus' major complaint with this regulatory scheme is with the "Vacancy Control and Decontrol" section of Cotati's rent control ordinance. This section prevents mobilehome park owners from charging a fair-market rent or increasing the existing rent when ownership of a mobilehome is transferred and the home remains in place.[11]

Cotati's vacancy control is commonly known as a premium capture provision. It creates a premium in the value of Cotati's mobilehomes, and a corresponding diminution in the value of its mobilehome parks, by granting homeowners a transferable right to indefinitely occupy Petitioners' property at below-market rents. Premium capture's windfall to homeowners – and losses to park owners – can be dramatic. *Adamson Cos. v. City of Malibu* reviewed Malibu's mobilehome premium capture provision and found that "it is difficult to conceive of any reason for the enactment of such an onerous ordinance other than a desire to please the current tenants of the parks, a large and very vocal voting constituency." (854 F. Supp. 1476, 1494-1495 (D. Cal. 1994)). Nonetheless, the district court ruled that the provision was

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[9] *Gregory v. City of San Juan Capistrano*, 142 Cal.App.3d 72, 82 (1983) (disapproved on another point by *Fisher v. City of Berkeley*, 37 Cal.3d 644, 686 note 43 (1984)).

[10] *Cashman v. City of Cotati*, 374 F.3d 887, 890 (9th Cir. 2004).

[11] *Cashman v. City of Cotati*, 374 F.3d 887, 890 (9th Cir. 2004).

entitled to judicial deference. (*Id.*) As a result, after *Adamson* Malibu mobilehome prices increased many times over, reflecting the value of the perpetual, freely alienable, below-market rents the ordinance granted homeowners. In Malibu this property right is worth ten to twenty times the mobile-home's intrinsic value, and can exceed $1 million.[12]

Other federal courts have struck down premium capture as irrational because it "vitiates" rent control's ability to create affordable housing.[13] Premium capture provisions force future tenants to pay incumbent tenants for the right to below-market rents, so future tenants obtain no benefit from rent control while their up-front housing costs and mortgage payments explode.[14] Future tenants also become dependant on local government officials to sustain the premium prices they pay for their homes. This captive constituency, and the chance to manage the "large and unwieldy bureaucracies" needed to oversee rent control's administrative apparatus have proved irresistible to many politicians, despite premium capture's lack of a relation to a legitimate government interest.[15] Since voters are unlikely to refuse large-scale majoritarian rent seeking from their landlords premium

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[12] *Mobile Home Madness: Prices top $1 million*, USA Today, July 7, 2005, viewable at (http://www.usatoday.com/money/perfi/housing/2005-07-05-million-dollar-trailers_x.htm).

[13] *Richardson v. Honolulu*, 124 F.3d 1150, 1165 (9th Cir. 1997), cert. denied, *Honolulu v. Small Landowners*, 525 U.S. 871, 119 S. Ct. 168, 142 L. Ed. 2d 137 (1998).

[14] *Adamson Cos. v. City of Malibu*, 854 F. Supp. at 1495, note 15 (D. Cal. 1994) (finding premium capture is "a one-time bonus to the tenants living in the park at the time it takes effect" that increases housing costs and excludes the poor from housing).

[15] *Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030, 1048 (9th Cir. 2000) (J. Fletcher, concurring).

capture provisions are frequently enacted and end up before federal courts.

In *Yee v. City of Escondido*, the Court resolved a circuit split by finding premium capture does not effect a physical taking because the mobilehome park owner invites the initial occupation.[16] In *Lingle*, the Court concluded premium capture does not effect a regulatory taking because irrational regulation is properly evaluated as violation of due process.[17] In the proceedings below the Ninth Circuit ruled, incorrectly, that following these decisions an allegation that a premium capture provision or other land use regulation is irrational no longer states any constitutional claim whatsoever.

SUMMARY OF ARGUMENT

The Court's *Considerations Governing Review on Certiorari* includes, *inter alia*, these examples of compelling reasons for granting certiorari: (1) where a United States court of appeals has decided an important federal question in a manner that conflicts with a state high court, (2) decided an important federal question in conflict with a decision of this Court, or (3) entered a decision in conflict with another United States court of appeals. (Sup. Ct. R 10 a, c).

All these considerations are present in *Cashman v. Cotati*. The Ninth Circuit's *Armendariz v. Penman* line of authority and its rule that substantive property infringements are only actionable under the Fifth Amendment has

[16] *Yee v. City of Escondido*, 503 U.S. 519, 527, 532-533, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992) (declining to decide whether mobilehome park premium capture violates substantive due process).

[17] *Lingle*, 125 S. Ct. at 2087 (J. Kennedy, concurring).

been rejected, distinguished or ignored by nine other circuit courts and numerous state high courts. Last term in *Lingle* the Court attempted to resolve this important federal question when it clarified that claims of irrational property regulation can only be brought as violations of the Fourteenth Amendment. Since irrational property regulation no longer effects a Fifth Amendment taking, the Ninth Circuit's rule that the Takings Clause subsumes all property claims is no longer tenable.

Lingle's clarification has been lost on the Ninth Circuit. It construes *Lingle*'s reversal of a successful takings claim predicated on irrational property regulation as support for its precedents baring due process claims on this theory. Rather than adjusting its precedents to conform with *Lingle*, the Ninth Circuit misinterprets *Lingle* so as to conform to its precedents.

Since the Ninth Circuit refuses to overrule its line of authority barring substantive due process property claims *Amicus* respectfully requests the Court grant certiorari and consider overruling it for them.

REASONS FOR GRANTING CERTIORARI

1. *Cashman v. Cotati* misconstrues *Lingle* as invalidating all constitutional claims predicated on irrational property regulation.

A. The Ninth Circuit ignores *Lingle's* instructions to evaluate allegations of irrational land use regulation under the Due Process Clause.

Lingle overruled the *Agins v. Tiburon* theory that a land use regulation which fails to advance a legitimate government interest effects a Fifth Amendment taking of

property. The *Agins* theory "prescribes an inquiry in the nature of a due process, not a takings test." (*Lingle*, 125 S. Ct. at 2083).

Citing *Lingle*, the Ninth Circuit withdrew a decision it had entered granting Cashman summary judgment on an *Agins* claim and summarily entered judgment for Cotati. (*Cashman v. City of Cotati*, 415 F.3d 1027, 1028 (9th Cir. 2005)). It denied Cashman's request to evaluate their successful *Agins* claim under the Fourteenth Amendment. (*Cert. Pet.* pp. 7-8).

Cashman received what Ninth Circuit *Agins* plaintiffs typically receive after *Lingle*: Dismissal with prejudice. In *Cohn v. Contra Costa Health Servs. Dep't.*, the Cohns alleged that Contra Costa County's refusal to allow them a septic tank was capricious and unrelated to a legitimate state interest, in violation of the Takings Clause and their Fourteenth Amendment substantive due process rights. The court dismissed both claims: The takings claim under *Lingle*, and the due process claim under Ninth Circuit law that deprivations of substantive property rights can only be addressed by a Fifth Amendment takings claim. (2005 U.S. Dist. LEXIS 33827, 6-7 (D. Cal. 2005)).[18]

Since the Fifth Amendment's Takings Clause is the exclusive source of substantive property rights for Ninth Circuit property owners, and since *Lingle* held that irrational property regulation no longer effects a taking, in the Ninth Circuit irrational or arbitrary land use

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[18] *See also Vista De Santa Barbara Assocs. v. City of Carpinteria*, 143 Fed. Appx. 33, 34 (9th Cir. 2005) (*Agins* claim dismissed with prejudice); *Stardust Mobile Estates LLC v. City of San Buenaventura*, 142 Fed. Appx. 300, 301 (9th Cir. 2005) (same); *Los Altos El Granada Investors v. City of Capitola*, 2005 U.S. Dist. LEXIS 36804, 14-15 (D. Cal. 2005) (*Agins* claim dismissed, leave to amend denied).

regulation no longer violates the Constitution. According to the Ninth Circuit, "*Lingle* requires that [a claim that a land use regulation is unrelated to a legitimate interest] be dismissed with prejudice."[19] Under this rule Cashman had no substantive due process claim despite proving that Cotati's ordinance failed to advance legitimate interests, and their other constitutional claims[20] were forfeit due to summary dismissal.

B. The Ninth Circuit's refusal to hear Cashman's Fourteenth Amendment substantive due process claim misapplies *Albright v. Oliver* and *Graham v. Conner* and misreads the Constitution.

The Ninth Circuit's bar on substantive due process property rights began with *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (*en banc*) (hereafter *Armendariz*). *Armendariz* held that Fourteenth Amendment substantive due process property claims were subsumed by the Takings Clause, the "more explicit" and so preclusive protection of property. (75 F.3d 1311, 1324 at note 8). *Armendariz* is a "blanket prohibition" of substantive due process claims against property deprivations.[21] In the Ninth Circuit all "claims alleging government interference with property fall under the Fifth Amendment's Takings Clause."[22]

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[19] *Spoklie v. Montana*, 411 F.3d 1051, 1058 (9th Cir. 2005).

[20] *Cert. Pet.* pp. 8-13 (citing *Nollan v. California Coastal Com.*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987)).

[21] *Squaw Valley Development Co. v. Goldberg*, 375 F.3d 936, 949 (9th Cir. 2004).

[22] *Madison v. Graham*, 316 F.3d 867, 870 (9th Cir. 2002).

The Ninth Circuit's conclusion that the Fifth Amendment's Takings Clause is the more explicit source of property rights ignores the Constitution's text and the logic of preclusion. In *Graham v. Conner*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) and *Albright v. Oliver*, 510 U.S. 266, 114 S. Ct. 807, 112 L. Ed. 2d 114 (1994), the Court expressed concern that constitutional protections provided criminal suspects by the Bill of Rights could be expanded by arguments that procedural irregularities or undue force "deprives a suspect of liberty without due process of law." (*Graham v. Connor*, 490 U.S. at 392-393). Since liberty is an imprecise and open-ended concept, it could be "used to impose additional requirements upon such of the States' criminal processes as are already addressed (and left without such requirements) by the Bill of Rights."[23] Therefore the Court concluded that constitutional criminal procedure and undue force protections precluded Fourteenth Amendment substantive due process claims based on the same conduct.

Armendariz's application of *Graham* to property deprivations was controversial even prior to *Lingle* because substantive due process protection of property owners is based on property, not liberty rights. ("No State shall . . . deprive any person of life, liberty, or property, without due process of law," U.S. Const. amdt. XIV, § 1). Arguably, the Fourteenth Amendment is the more explicit source of property rights since it applies to the states directly, whereas the Takings Clause ("[N]or shall private property be taken for

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[23] *Albright v. Oliver*, 510 U.S. 266, 275 (1994) (J. Scalia, concurring).

public use, without just compensation," U.S. Const. amdt. V) applies indirectly, via incorporation.[24]

One commentator describes the circuits' sketchy logic and its policies' harsh consequences as follows: "Thus, by starting with *Graham* (Fourth Amendment seizures), applying its doctrine more generally through *Albright* (criminal protections in the Bill of Rights), the Ninth Circuit has prohibited all substantive due process claims in land development cases in federal courts west of the Rockies."[25]

C. *Armendariz's* blanket prohibition of due process is untenable after *Lingle*

Whatever the past merits of a blanket prohibition of substantive due process property claims after *Lingle* such a bar is clearly untenable. A Fourteenth Amendment substantive due process claim is precluded under *Graham* only if "its subject is necessarily governed by a more definite provision of the Constitution." (*County of Sacramento v. Lewis*, 523 U.S. 833, 842, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998)). "Substantive due process analysis is therefore inappropriate [only if plaintiffs'] claim is covered by" another constitutional provision. (*Id.* at 843) (finding no preclusion).

Lingle held that irrational land use regulation is not covered by the Fifth Amendment's Takings Clause, so claims against irrational regulation can not be precluded by the Clause. *Armendariz*'s rule that property deprivations either

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[24] *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 240, 41 L. Ed. 979, 17 S. Ct. 581 (1897).

[25] Robert Ashbrook, *Comment: Land Development, the Graham Doctrine, and the Extinction of Economic Substantive Due Process*, 150 U. Pa. L. Rev. 1255, 1269-1270 (2002).

violate the Fifth Amendment or they violate nothing is untenable after *Lingle*.

D. *Lingle* anticipated and explicitly rejected the Ninth Circuit's foreclosure of substantive due process property rights.

Lingle examined a Hawaiian rent control ordinance limiting the rent gas station owners can charge station operators. The ordinance was intended to lower high retail gasoline prices and reduce market concentration, but its premium capture provision worsened both problems.[26] Chevron attacked the law as a violation of Fourteenth Amendment substantive due process and a Fifth Amendment takings. After winning summary judgment on its takings claim Chevron voluntarily dismissed its due process cause of action.[27]

Lingle reversed the judgment for Chevron on the grounds that premium capture provisions should be evaluated as a denial of due process, "an inquiry logically prior to and distinct from the question whether a regulation effects a taking." (*Lingle*, 125 S. Ct. at 2084). *Lingle* repeatedly endorses due process review of property deprivations. (*Id.*) Justice O'Connor describes her *Lingle* opinion as affirming the Due Process Clause's prohibition against irrational land use regulation.[28]

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[26] *Chevron USA, Inc. v. Cayetano*, 198 F. Supp. 2d 1182, 1183 (D. Haw. 2002).

[27] *Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030, 1035 (9th Cir. 2000).

[28] *Kelo v. City of New London*, 125 S. Ct. 2655, 2676, 162 L. Ed. 2d 439 (2005) (J. O'Connor, dissenting).

Justice Kennedy wrote separately in *Lingle* to emphasize this point:

> "This separate writing is to note that today's decision does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process. The failure of a regulation to accomplish a stated or obvious objective would be relevant to that inquiry. Chevron voluntarily dismissed its due process claim without prejudice, however, and we have no occasion to consider whether [the challenged law] represents one of the rare instances in which even such a permissive standard has been violated. (*Lingle*, 125 S. Ct. at 2087 (J. Kennedy, concurring) (citations and quotations omitted)).

The Ninth Circuit blithely treats Cashman as the Court treated Chevron, ignoring *Lingle*'s instructions not to interpret the judgment against Chevron as foreclosing Fourteenth Amendment scrutiny for ineffective legislation.

2. A majority of circuit courts and many state high courts implicitly or explicitly reject the Ninth Circuit's blanket prohibition of due process property rights.

Deciding whether the Fourteenth Amendment provides property rights has fractured the circuits. The Sixth Circuit noted the "remarkable" difference in property rights between federal jurisdictions and sought the Court's intervention:

> "The lack of uniformity among the circuits in dealing with zoning cases of the 'arbitrary and capricious substantive due process' category is remarkable . . . We wish it were within our power to harmonize these decisions, but the conflicts

> among circuits are too great. Harmony will have to await action by the Supreme Court."[29]

A majority of circuit courts do not follow *Armendariz*,[30] and nine circuits entertain at least some substantive due process property violations on their merits.

The Fifth, Sixth and First Circuits have considered *Armendariz* and decline to follow it. In *John Corp. v. City of Houston* the Fifth Circuit evaluated the conflicting authority and decided not to follow *Armendariz*. (214 F.3d 573, 583 (5th Cir. 2000)).

In *Pearson v. Grand Blanc*, the Sixth Circuit overturned a district court ruling that "all arbitrary and capricious substantive due process claims are merged" into taking claims. (961 F.2d 1211, 1216, 1223 (6th Cir. 1992)). Recently, the Sixth Circuit has continued to follow *Pearson* (*e.g. Tri-Corp. Mgmt. Co. v. Praznik*, 33 Fed. Appx. 742, 747 (6th Cir. 2002)) but will dismiss a substantive due process property claim under *Armendariz* where the plaintiff "merely re-states" their takings claims. (*Buckles v. Columbus Mun. Airport Auth.*, 90 Fed. Appx. 927, 931 (6th Cir. 2004)).

In *South County Sand & Gravel Co. v. Town of S. Kingstown*, the First Circuit allowed that *Armendariz* may properly bar "garden-variety" takings claims brought as due process violations, but declined to overrule circuit authority recognizing traditional substantive due process property rights. (160 F.3d 834, 835-836 (1st Cir. 1998)).

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[29] *Pearson v. Grand Blanc*, 961 F.2d 1211, 1217-1220, note 45 (6th Cir. 1992).

[30] *John Corp. v. City of Houston*, 214 F.3d 573, 583 (5th Cir. 2000) (finding *Armendariz*'s "blanket rule" eliminating substantive due process property rights "inconsistent with our precedents and with the approach taken by a majority of other circuit courts.").

The D.C. Circuit has not considered *Armendariz* but rejects its reasoning. *Tri County Indus. v. District of Columbia* ruled that *Graham* and *Albright* do not support preclusion of substantive due process property claims. (105 F.3d 455, 459 (D.C. Cir. 1997)).

The Second, Third, Fourth, Eighth and Eleventh Circuits allow substantive due process property claims without discussing *Graham* or preclusion. (*UA Theatre Circuit v. Twp. of Warrington*, 316 F.3d 392, 401 (3d Cir. 2003); *Villas of Lake Jackson v. Leon County*, 121 F.3d 610, 614 (11th Cir. 1997); *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 828 (4th Cir. 1995); *Lisa's Party City, Inc. v. Town of Henrietta*, 185 F.3d 12, 17 (2d Cir. 1999); *Bituminous Materials v. Rice County*, 126 F.3d 1068, 1070 (8th Cir. 1997)).

Only the Seventh, Ninth and Tenth Circuits bar all substantive due process property claims, and only the Tenth follows *Armendariz* and does so on the basis of *Graham*. (*Bateman v. City of W. Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996); *Gosnell v. City of Troy*, 59 F.3d 654, 657 (7th Cir. 1995)).

A. State courts uniformly reject the Ninth Circuit's interpretation of *Lingle*.

Many state high courts entertained federal substantive due process property claims even prior to *Lingle*. In *Mission Springs, Inc. v. City of Spokane*, Spokane approved Mission Springs' thirty-three building apartment project subject to several conditions, which Mission Springs fulfilled. Due to political pressure Spokane withheld Mission Springs' construction permit, despite the City Attorney's advice that it lacked any legal basis to do so. (134 Wn.2d 947, 952-954 (Wash. 1998)).

Distinguishing *Armendariz*, the Washington Supreme Court found Spokane's actions violated the Fourteenth Amendment, not the Takings Clause. "Thus, we follow that overwhelming body of authority which applies Due Process principles to similar factual situations." (*Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 964).[31]

As of this writing every published state court decision that has considered the matter disagrees with the Ninth Circuit's interpretation of *Lingle*. In *Gove v. Zoning Bd. of Appeals*, the Supreme Judicial Court of Massachusetts examined a property owner's federal takings and substantive due process claims against a zoning board. In light of *Lingle*'s discussion of due process review the court concluded "*Lingle* renders a zoning ordinance valid under the United States Constitution unless its application bears no reasonable relation to the State's legitimate purpose." (*Gove v. Zoning Bd. of Appeals*, 444 Mass. 754, 760 (Mass. 2005) (quotations omitted)). Not in the Ninth Circuit; here *Lingle* renders a zoning ordinance valid no matter how unreasonable and requires that a claim otherwise "be dismissed with prejudice."[32]

The Supreme Judicial Court of Massachusetts dismissed Gove's *Agins* claim but addressed her substantive due process claim on its merits. In contrast, Cashman, and other Ninth Circuit property owners, lost both claims after

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[31] *See also Blumenthal Inv. Trusts v. City of W. Des Moines*, 636 N.W.2d 255, 263 (Iowa 2001) (distinguishing substantive due process property violations from takings); *Brunelle v. Town of S. Kingstown*, 700 A.2d 1075, 1083-1084, note 5 (R.I. 1997) (same); *Carpenter v. City of Petal*, 699 So.2d 928, 932-934 (Miss. 1997) (finding anti-mobilehome zoning ordinance violated substantive due process); *Red Maple Properties v. Zoning Com. of Brookfield*, 222 Conn. 730, 739 (Conn. 1992); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 938 (Tex. 1998).

[32] *Spoklie v. Montana*, 411 F.3d 1051, 1058 (9th Cir. 2005).

Lingle. (*Cohn v. Contra Costa Heal & Servs. Dep't*, 2005 U.S. Dist. LEXIS 33827, 6-7 (D. Cal. 2005) (dismissing *Agins* and due process claim under *Armendariz* and *Lingle*) (discussed *ante* p.8)).

In *Consol. Waste Sys., LLC v. Metro Gov't of Nashville*, plaintiff prevailed on a federal substantive due process claim against a county that had repeatedly changed its zoning to prevent plaintiff from building a landfill, despite pleas that a landfill was needed and plaintiff's was the only suitable site. (2005 Tenn. App. LEXIS 382, 5-8 (Tenn. Ct. App. 2005)). The county appealed on the grounds that plaintiff's substantive due process property rights were subsumed by the Takings Clause – the *Armendariz* rule. (*Id.* at 12).

The court declined to follow *Armendariz*, finding that after *Lingle Armendariz* was no longer tenable:

> "The consequence of the *Lingle* holdings to the issue before us is clear. The Due Process Clause and the Takings Clause provide different protections from governmental action . . . Consequently, just because a zoning ordinance affects real property, a landowner is not precluded from bringing a claim challenging the validity of that ordinance on the basis it is not rationally related to a legitimate governmental purpose. The Takings Clause does not pre-empt a challenge to a zoning ordinance based on substantive due process. To the contrary, as the Court stated in *Lingle*, the due process challenge precedes any takings claim."[33]

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[33] *Consol. Waste Sys., LLC v. Metro Gov't of Nashville*, 2005 Tenn. App. LEXIS 382, 80 (Tenn. Ct. App. 2005).

3. *Armendariz*'s bar to *Euclid* allows Ninth Circuit municipalities to enact legislative schemes the Court has previously struck down and should be overruled.

Substantive due process has had a continuous role in federal oversight of land use regulation since the Fourteenth Amendment's enactment. In 1887, *Mugler v. Kansas* found that Kansas's prohibition of alcohol did not deprive brewers of property without due process, articulating the substantial relation to public health, safety or morals test still applied today.[34] In 1926, the Court handed down *Village of Euclid v. Ambler Realty Co.*, confirming that the due process standard applied to zoning.[35] *Lingle* called *Euclid* "historic,"[36] and the case lent its name to the "Euclidian" zoning approved by the Court and enacted throughout the country.[37]

While the *Euclid* standard is highly deferential municipalities habitually test its limits. Just two years after *Euclid*, *Nectow v. Cambridge* found that Cambridge, Massachusetts' zoning of a parcel of land bordering a glue factory, a Ford Motor plant and railroad tracks for residential use was arbitrary and irrational and failed *Euclid* due process scrutiny.[38]

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[34] *Mugler v. Kansas*, 123 U.S. 623, 66, 8 S. Ct. 273, 31 L. Ed. 205 (1887).

[35] *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

[36] *Lingle*, 125 S. Ct. at 2083.

[37] *Goodwin v. Kansas City*, 244 Kan. 28, 32 (Kan. 1988).

[38] *Nectow v. Cambridge*, 277 U.S. 183, 187-88, 72 L. Ed. 842, 48 S. Ct. 447 (1928); *see also Moore v. East Cleveland*, 431 U.S. 494, 520-521, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977) (J. Stevens, concurring) (zoning ordinance allowing grandchildren to live with their grandmother if they are siblings, but not if they are cousins, "must fall" under *Euclid* and *Nectow*).

The Court has applied, cited or analyzed *Euclid* and *Nectow* in many of the land use cases before it, including *Lingle*, and many state high courts have adopted their holdings as the state's zoning standard of review.[20]

Euclid establishes the minimum due process municipalities must provide property owners – except in the Ninth Circuit. Here there is no constitutional bar on irrationality nor requirement for due process because *Armendariz* specifically bars all *Euclid* claims:

> "We need not and do not address whether the City's conduct was rational. Even if the City's alleged conduct was 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare,' *Euclid v. Ambler Realty Co.*, the plaintiffs' substantive due process claim fails because it is preempted by other constitutional claims under the rule of *Graham v. Connor*." (*Armendariz*, 75 F.3d at 1319 (9th Cir. 1996) (citations omitted)).

Ninth Circuit municipalities are free to enact any manner of unreasonable land use schemes, even those the Court has previously struck down. In *Buckles v. King County*, the Buckles' property was "singled out . . . and specially zoned for a use classification totally different from and inconsistent with the classification of surrounding land." (191 F.3d 1127, 1138 (9th Cir. 1999)). The Buckles' zoning was arbitrarily changed from limited commercial to exclusively residential – the same facts as *Nectow*. (*Id.* at 1131-1132). No matter; their substantive due process claim failed under *Armendariz*. (*Id.* at 1138).

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[20] *Lingle*, 125 S. Ct. at 2083-2085; *see* note 31, p. 16 *ante* for state cases.

Armendariz's bar on *Euclid* should be overruled and *Cashman v. Cotati* is the perfect case to do it. Cashman had a ripe, timely takings claim that precluded a ripe, timely due process claim. The Ninth Circuit construes *Lingle* to mean that Cashman has lost both. This is wrong, and the Ninth Circuit's line of cases saying otherwise needs to be overruled, starting with *Armendariz*.

CONCLUSION

The important federal question of whether the Fourteen Amendment provides property rights has divided the circuits and raised doubts as to the constitutional limitations on government regulation. The Court took a step towards settling this question last term but the Ninth Circuit has proven unable to follow *Lingle*'s instructions. The Court can complete the process it began in *Lingle* by granting certiorari and considering whether to restore Fourteenth Amendment rights to property owners west of the Rockies.[40]

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[40] Robert Ashbrook, *Comment: Land Development, the Graham Doctrine, and the Extinction of Economic Substantive Due Process*, 150 U. Pa. L. Rev. 1255, 1269-1270 (2002).